MAHDI KERAMATVIYARSAGH KHODAVIRDI v. PP

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
[CRIMINAL APPEAL NO: B-05-2-01-2014 (IRN)]
28 JANUARY 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(2) – Trafficking in 218.5 grams and 362.7 grams of methamphetamine – Conviction and sentence – Appeal against – Evidence of chemist – Proof by written statement – Admissibility – Compliance of preconditions under s. 402B(2) of Criminal Procedure Code – Whether contents and weight of drugs sufficiently proved by chemist*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Evidence of chemist – Proof by written statement – Admissibility – Compliance of preconditions under s. 402B(2) of Criminal Procedure Code – Whether analysis of drugs by chemist challenged – Whether there was sufficient evidence by chemist to prove contents and weight of drugs*

The appellant was charged with two counts of trafficking in dangerous drugs, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The first charge was in relation to 39 capsules containing 218.5 grams of methamphetamine wrapped in four tissue lumps tucked at the appellant's waist. The second charge was in respect of 362.7 grams of methamphetamine in 74 capsules swallowed by the appellant, which were subsequently discharged at the hospital. The drugs were analysed by the chemist ('SP1'). The appellant was subsequently convicted and sentenced to death by the High Court. Hence, the present appeal. The main ground of appeal was premised on s. 402B of the Criminal Procedure Code ('CPC') which allowed for proof by written statement of any witness subject to the conditions as set out in paras. (a), (b) and (c) of sub-s. (2). The appellant submitted that the witness statement of SP1, in particular the signing page, did not contain SP1's signature and also did not contain a declaration by SP1 to the effect that the statement was true to the best of his knowledge and belief. In consequence to the failure to adhere to the strict compliance of the preconditions, the written statement of SP1 was argued to be inadmissible in evidence. As such, it was alleged that there was no evidence that the substances analysed by SP1 were dangerous drugs. In response, the prosecution argued that although the witness statement was not signed by SP1, SP1 was present in court and was cross-examined by the defence. Further, the DPP argued that there was no indication that the result of the analysis by SP1 was challenged by the appellant. Hence, the prosecution contended that there was sufficient evidence by SP1 to prove the contents and weight drugs.

A **Held (allowing appeal; setting aside order of High Court; remitting case to High Court for retrial before another judge; appellant remanded pending disposal of trial)**
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

B **(1)** From the clear wordings of s. 402B of the CPC, the preconditions in sub-s. (2) must be complied with before the witness statement of SP1 could be admitted as evidence. The witness statement did not bear SP1's signature and neither did it contain a declaration as required under para. (2)(b) of s. 402B of the CPC. Hence, the preconditions set out in para. (2) for the admissibility of the evidence had not been complied C with, rendering the witness statement of SP1 inadmissible. Consequently, there was no evidence on the nature or contents and the weight of the capsules. The subject matter of the charge, namely methamphetamine, had not been proved. (para 13)

D **(2)** The fact that SP1 was cross-examined could not derogate from the legal position of s. 402B of the CPC. Any default, waiver or consent could not supersede the written law. Thus the inadmissible evidence of SP1 remained inadmissible notwithstanding any waiver or consent by the appellant. (para 14)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah dipertuduh dengan dua pertuduhan atas kesalahan mengedar dadah berbahaya, satu kesalahan yang boleh dihukum di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('Akta'). Pertuduhan pertama adalah berkaitan dengan 39 kapsul yang mengandungi 218.5 gram methamphetamine F dibungkus dalam empat ketulan tisu yang terikat pada pinggang perayu. Pertuduhan kedua adalah berkenaan dengan 362.7 gram methamphetamine dalam 74 kapsul yang ditelan oleh perayu, yang kemudiannya dikeluarkan di hospital. Dadah tersebut telah dianalisa oleh ahli kimia ('SP1'). Perayu kemudiannya disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Oleh itu, rayuan ini. Alasan utama rayuan adalah berdasarkan G s. 402B Kanun Tatacara Jenayah ('KTJ') yang membenarkan keterangan kenyataan bertulis mana-mana saksi tertakluk kepada syarat-syarat seperti yang diperuntukkan dalam perenggan-perenggan (a), (b) dan (c) sub-s. (2). Perayu menghujahkan bahawa kenyataan saksi daripada SP1, khususnya halaman tandatangan, tidak mengandungi tandatangan SP1 dan juga tidak H mengandungi akuan oleh SP1 yang menyatakan bahawa pernyataan tersebut adalah benar sepanjang pengetahuan dan kepercayaannya. Akibat daripada kegagalan untuk mematuhi peraturan ketat pra-syarat, kenyataan bertulis SP1 tidak boleh diterima masuk sebagai keterangan. Oleh itu, adalah dihujahkan bahawa tiada bukti bahawa bahan yang dianalisa oleh SP1 adalah dadah I berbahaya. Sebagai balasan, pihak pendakwaan berhujah bahawa walaupun kenyataan saksi tersebut tidak ditandatangani oleh SP1, SP1 hadir di mahkamah dan telah disoal balas oleh pihak pembelaan. Di samping itu,

Pihak pendakwaan menghujahkan bahawa tiada sebarang petunjuk bahawa hasil analisis SP1 telah dicabar oleh perayu. Oleh itu, TPR menegaskan bahawa terdapat keterangan yang mencukupi oleh SP1 untuk membuktikan kandungan dan berat dadah tersebut.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi; mengembalikan kes kepada Mahkamah Tinggi untuk dibicarakan semula di hadapan hakim yang lain; perayu direman sementara menunggu pelupusan perbicaraan)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Daripada perkataan-perkataan yang jelas dalam s. 402B KTJ, pra-syarat dalam sub-s. (2) hendaklah dipatuhi sebelum kenyataan saksi daripada SP1 boleh diterima masuk sebagai keterangan. Kenyataan saksi tidak mengandungi tandatangan SP1 dan begitu juga ia tidak mengandungi akuan seperti yang dikehendaki di bawah perenggan (2)(b) s. 402B KTJ. Oleh itu, pra-syarat yang dinyatakan dalam perenggan (2) bagi kebolehterimaan keterangan tersebut tidak dipatuhi, yang mengakibatkan kenyataan saksi SP1 tidak boleh diterima masuk. Oleh itu, tiada bukti mengenai sifat atau kandungan dan berat kapsul. Hal perkara pertuduhan tersebut, iaitu dadah berbahaya methamphetamine, tidak dibuktikan.

(2) Fakta bahawa SP1 telah disoal balas tidak boleh merendahkan kedudukan undang-undang s. 402B KTJ. Apa-apa keingkaran, pengenepian atau persetujuan tidak boleh mengatasi undang-undang bertulis. Oleh itu keterangan yang tidak boleh diterima masuk daripada SP1 kekal tidak boleh diterima masuk walaupun terdapat apa-apa penepian atau persetujuan oleh perayu.

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chah Siew Kok v. PP [1987] 1 CLJ 386; [1987] CLJ (Rep) 518 HC ***(refd)***
Fan Yew Teng v. PP [1971] 1 LNS 29 FC ***(refd)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 SC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 402B
Dangerous Drugs Act 1952, ss. 37(da), 39B(2)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Nurshafini Mustapha; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-197-2010 (overruled).]

Reported by Sandra Gabriel

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JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The appellant was charged at the High Court Shah Alam with two counts of trafficking in dangerous drugs, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act).

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[2] The first charge was in relation to 39 capsules containing 218.5g of methamphetamine. The capsules were wrapped in four tissue lumps and they were found tucked at the appellant's waist. The second charge was in respect of 362.7g of methamphetamine in 74 capsules swallowed by the appellant, which was subsequently discharged at the Hospital Serdang. The drugs were analysed by the chemist, Zulkefli bin Mohd. Edin (SP1).

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[3] The appellant was convicted and sentenced to death by the High Court. Against the conviction and sentence, the appellant appealed to the Court of Appeal.

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The Appeal

[4] Before us, learned counsel for the appellant raised three grounds of appeal:

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(i) The evidence of the chemist (SP1) was inadmissible in law;

(ii) The learned trial judge erred when he criticised the defence for not tendering the cautioned statement; and

(iii) The learned trial judge erred when he failed to rule at the end of the defence case whether the presumption of trafficking under s. 37(da) of the Act had been rebutted.

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[5] Having heard the arguments and having perused the record of appeal, we found merits in the first ground of appeal (which ground was sufficient to dispose the appeal). The appeal was accordingly allowed, but we ordered a re-trial. Our reasons now follow.

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[6] Learned counsel's argument on the first ground was premised on s. 402B of the Criminal Procedure Code (CPC). The section provides:

Proof by written statement

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402B (1) In any criminal proceedings, a written statement by any person shall, with the consent of the parties to the proceedings and subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) A statement may be tendered in evidence under subsection (1) if:

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(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief; and

(c) a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings not later than fourteen days before the commencement of the trial unless the parties otherwise agree.

[7] Section 402B allows for proof by written statement of any witness subject to the conditions as set out in paras (a), (b) and (c) of sub-s. (2). For the purpose of the appeal, we were only concerned with the preconditions set out in paras. (a) and (b), namely whether the witness statement had been signed by SP1 and whether the statement contained a declaration to the effect that it is true to the best of SP1's knowledge and belief.

[8] The notes of proceedings revealed the following when SP1 took the stand:

Pemeriksaan Utama

Saya sediakan keterangan saya dalam bentuk bertaip.

Mah: Diterima dan akan ditaipkan sebagai sebahagian Nota Keterangan dalam kes ini.

Thereafter, from pp. 9 until 20 of rekod rayuan jld 1, the notes of proceedings consist of the reproduction of the witness statement of SP1.

[9] Our attention was drawn to the witness statement (Rekod Rayuan Jld II: pp. 303 to 308) in particular to the signing page, where no signature was found thereon. The witness statement also did not contain a declaration by SP1 to the effect that the statement was true to the best of his knowledge and belief.

[10] It was thus the submission of learned counsel that the preconditions in paras. (a) and (b) had not been met and that without the strict compliance of the preconditions, the written statement of SP1 was inadmissible in evidence. As such, it was submitted that there was no evidence that the substances analysed by SP1 were dangerous drugs.

[11] In response, learned Deputy Public Prosecutor argued that although the witness statement was not signed by SP1, he was present in court and he was cross-examined by the defence counsel. Further, learned Deputy Public Prosecutor argued that there was no indication that the result of the analysis by SP1 was challenged. Hence, learned Deputy Public Prosecutor contended that there was sufficient evidence by the chemist, SP1 to prove the dangerous drugs.

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Our Decision

[12] Section 402B deals with proof of written statement and it relates to the issue of admissibility of the evidence stated therein. From the clear wordings of the section, we agreed with learned counsel that the preconditions in sub-s. (2) must be complied with before the witness statement of SP1 can be admitted as evidence.

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[13] We have perused the notes of proceedings and we found no indication that SP1 had read out the witness statement. We further found that the witness statement of SP1 did not bear his signature and neither did the witness statement contain a declaration as required under para. (2)(b) of s. 402B of the CPC. Hence, the preconditions set out in para. (2) for the admissibility of the evidence had not been complied with, rendering the witness statement of SP1 inadmissible. Consequently, there was no evidence on the nature or contents and the weight of the capsules. The subject matter of the charge, namely the dangerous drugs, methamphetamine had not been proven.

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[14] The fact that SP1 was cross-examined cannot derogate from the legal position or the application of s. 402B of the CPC. As regards the rules of procedure and evidence in criminal law, no default by the defence and no waiver or admission could be held against him. Any default, waiver or consent cannot supersede the written law (see *Chah Siew Kok v. Public Prosecutor* [1987] 1 CLJ 386; [1987] CLJ (Rep) 518; *Ooi Lean Chai v. Public Prosecutor* [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337; [1991] 2 MLJ 552; *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705; [1996] 1 MLJ 209; *Fan Yew Teng v. Public Prosecutor* [1971] 1 LNS 29; [1971] 2 MLJ 271). The inadmissible evidence of SP1 thus remained inadmissible notwithstanding any waiver or consent by the appellant.

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[15] Learned counsel for the appellant had referred us the case of *Mohamed Ismail Sahul Hameed v. Pendakwa Raya* (Mahkamah Persekutuan Rayuan Jenayah 05-31-02/2013(P)) where the evidence of the chemist was given through witness statement, prior to the coming into force of s. 402B of the CPC. The Federal Court in *Mohamed Ismail (supra)*, ordered a retrial.

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[16] In the light of the above, we unanimously made the following orders:

(i) The appeal was allowed;

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(ii) The order of the High Court was set aside;

(iii) The case was remitted to the High Court at Shah Alam for retrial before another judge; and

(iv) The appellant be remanded pending the disposal of the retrial.

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